

SENATE BILL 46:

A Referendum to the People of Montana to Amend Article II, Section 10, Right of Privacy
Senator Dan McGee – February 11, 2009

1. This is a referendum to the people of Montana to amend their Constitution
 - Proposes to amend Article II, Section 10, Right of Privacy, to state: *"The protection of unborn human life is a compelling state interest."*
 - Within the rights of the People of Montana under the provisions of Article II, Sections 1, Popular Sovereignty, and 2, Self-Government
2. Montana's Constitutional right to privacy is a fundamental right, but is not an exclusive right. The right of Privacy can be infringed upon the showing of a compelling state interest.
3. The Right of Privacy article has been used in several legal challenges to the legitimate duty of the Legislature to regulate and control the process of abortion.
4. Legal Background:
 - 1) Roe v. Wade, 1973
 - a) *"State criminal abortion laws...violate the Due Process Clause of the Fourteenth Amendment, which protects against state action the right to privacy, including a woman's qualified right to terminate her pregnancy."*
 - b) *"The state cannot override that right, it has legitimate interests in protecting both the pregnant woman's health and the potentiality of human life, each of which interests grow and reaches a "compelling" point at various stages of the woman's approach to term."*
 - c) *"For the stage subsequent to viability the State, in promoting its interest in the potentiality of human life, may, if it chooses, regulate, and even proscribe, abortion, except...for the preservation of the life or health of the mother."*
 - d) *The State may define the term "Physician" to mean only a physician currently licensed by the state, and may proscribe any abortion by a person who is not a physician as so defined.*
 - 2) Doe v Dalton, 1973
 - a) Pregnant woman does not have absolute constitutional right to abortion on her demand.
 - 3) Webster v. Reproductive Health, 1989
 - a) *"This court has emphasized that Roe implies no limitation on a State's authority to make a value judgment favoring childbirth over abortion."*
 - b) *"...this court upheld governmental regulations withholding public funds for non-therapeutic abortions but allowing payments for medical services related to childbirth, recognizing that a government's decision to favor childbirth over abortion through the allocation of public funds does not violate Roe v. Wade."*
 - c) Reiterates state's interest in protecting human life

- d) Viability as the point at which its interest in potential human life must be safeguarded.
 - e) Emphasized maternal health
 - f) *"There is also no reason why the State's compelling interest in protecting potential human life should not extend throughout pregnancy rather than coming into existence only at the point of viability."*
 - g) Argues that Roe's trimester framework should be overturned.
- 4) Planned Parenthood v. Casey
- a) Viability, state's legitimate interest, informed consent
 - b) No. 14 – discussion on effects of overturning Roe v. Wade
5. Montana Case Law – U.S. Supreme Court Decisions
- 1) Lambert v Wicklund, March 31, 1997, found valid a Montana law that a minor's parents be notified prior to having an abortion.
 - 2) Mazurek v. Armstrong, June 16, 1997, found valid a Montana Law restricting abortions to licensed physicians.
6. Montana Case Law – State Supreme Court Decisions
- 1) Intermountain Planned Parenthood v. State, cause No. BDV 97-477
 - 2) Planned Parenthood of Missoula v. State, Lewis & Clark County, December 29, 1999
 - 3) Doe v. Deschamps, 461F.Supp 682 (D.C. Mont. 1976)
 - 4) Armstrong V. Mazurek, 906 F.SSupp 561C D.C. Mont. 1993
7. In the cases brought before the Montana Supreme Court – even cases found valid by the U.S. Supreme Court – all such cases have been overturned based largely or entirely on the first portion of Article II, Section 10. In all such cases, the Montana Supreme Court has found that the State has not demonstrated a "compelling state interest".
8. The Montana Supreme Court has further not defined what constitutes a "compelling state interest", leaving the decision to a case by case analysis.
9. Senate Bill 46 is necessary to submit to the people of Montana the opportunity to define that:
- "PROTECTION OF UNBORN HUMAN LIFE IS A COMPELLING STATE INTEREST".**
10. The people of Montana must decide this question, not the Montana Supreme Court.
11. The people of Montana have the right and duty to determine this issue pursuant to Article II, Sections 1 & 2.

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 **Oyez** Case Summary
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washingtonpost.com

U.S. Supreme Court

ROE v. WADE, 410 U.S. 113 (1973)

410 U.S. 113

**ROE ET AL. v. WADE, DISTRICT ATTORNEY OF DALLAS COUNTY
APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF
TEXAS
No. 70-18.**

**Argued December 13, 1971 Reargued October 11, 1972
Decided January 22, 1973**

A pregnant single woman (Roe) brought a class action challenging the constitutionality of the Texas criminal abortion laws, which proscribe procuring or attempting an abortion except on medical advice for the purpose of saving the mother's life. A licensed physician (Hallford), who had two state abortion prosecutions pending against him, was permitted to intervene. A childless married couple (the Does), the wife not being pregnant, separately attacked the laws, basing alleged injury on the future possibilities of contraceptive failure, pregnancy, unpreparedness for parenthood, and impairment of the wife's health. A three-judge District Court, which consolidated the actions, held that Roe and Hallford, and members of their classes, had standing to sue and presented justiciable controversies. Ruling that declaratory, though

not injunctive, relief was warranted, the court declared the abortion statutes void as vague and overbroadly infringing those plaintiffs' Ninth and Fourteenth Amendment rights. The court ruled the Does' complaint not justiciable. Appellants directly appealed to this Court on the injunctive rulings, and appellee cross-appealed from the District Court's grant of declaratory relief to Roe and Hallford. Held:

1. While 28 U.S.C. 1253 authorizes no direct appeal to this Court from the grant or denial of declaratory relief alone, review is not foreclosed when the case is properly before the Court on appeal from specific denial of injunctive relief and the arguments as to both injunctive and declaratory relief are necessarily identical. P. 123.
2. Roe has standing to sue; the Does and Hallford do not. Pp. 123-129.
 - (a) Contrary to appellee's contention, the natural termination of Roe's pregnancy did not moot her suit. Litigation involving pregnancy, which is "capable of repetition, yet evading review," is an exception to the usual federal rule that an actual controversy [410 U.S. 113, 114] must exist at review stages and not simply when the action is initiated. Pp. 124-125.
 - (b) The District Court correctly refused injunctive, but erred in granting declaratory, relief to Hallford, who alleged no federally protected right not assertable as a defense against the good-faith state prosecutions pending against him. *Samuels v. Mackell*, 401 U.S. 66. Pp. 125-127.
 - (c) The Does' complaint, based as it is on contingencies, any one or more of which may not occur, is too speculative to present an actual case or controversy. Pp. 127-129.
3. State criminal abortion laws, like those involved here, that except from criminality only a life-saving procedure on the mother's behalf without regard to the stage of her pregnancy and other interests involved violate the Due Process Clause of the Fourteenth Amendment, which protects against state action the right to privacy, including a woman's qualified right to terminate her pregnancy. Though the State cannot override that right, it has legitimate interests in protecting both the pregnant woman's health and the potentiality of human life, each of which interests grows and reaches a "compelling" point at various stages of the woman's approach to term. Pp. 147-164.
 - (a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician. Pp. 163, 164.
 - (b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health. Pp. 163, 164.
 - (c) For the stage subsequent to viability the State, in promoting its interest in the potentiality of human life, may, if it chooses, regulate, and even proscribe, abortion except where necessary, in appropriate medical judgment, for the preservation of the life or health of the mother. Pp. 163-164; 164-165.
4. The State may define the term "physician" to mean only a physician currently licensed by the State, and may proscribe any abortion by a person who is not a physician as so defined. P. 165.
5. It is unnecessary to decide the injunctive relief issue since the Texas authorities will doubtless fully recognize the Court's ruling [410 U.S. 113, 115] that the Texas criminal abortion statutes are unconstitutional. P. 166.

314 F. Supp. 1217, affirmed in part and reversed in part.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and DOUGLAS, BRENNAN, STEWART, MARSHALL, and POWELL, JJ., joined. BURGER, C. J., post, p. 207, DOUGLAS, J., post, p. 209, and STEWART, J., post, p. 167, filed concurring opinions. WHITE, J.,

Cite as 93 S.Ct. 739 (1973)

410 U.S. 179, 35 L.Ed.2d 201

struck down today was, as the majority notes, first enacted in 1857¹¹⁷⁷ and "has remained substantially unchanged to the present time." *Ante*, at 710.

There apparently was no question concerning the validity of this provision or of any of the other state statutes when the Fourteenth Amendment was adopted. The only conclusion possible from this history is that the drafters did not intend to have the Fourteenth Amendment withdraw from the States the power to legislate with respect to this matter.

III

Even if one were to agree that the case that the Court decides were here, and that the enunciation of the substantive constitutional law in the Court's opinion were proper, the actual disposition of the case by the Court is still difficult to justify. The Texas statute is struck down *in toto*, even though the Court apparently concedes that at later periods of pregnancy Texas might impose these selfsame statutory limitations on abortion. My understanding of past¹¹⁷⁸ practice is that a statute found to be invalid as applied to a particular plaintiff, but not unconstitutional as a whole, is not simply "struck down" but is, instead, declared unconstitutional as applied to the fact situation before the Court. *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886); *Street v. New York*, 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969).

For all of the foregoing reasons, I respectfully dissent.

5. Indiana (1838).
6. Iowa (1843).
7. Maine (1840).
8. Massachusetts (1845).
9. Michigan (1846).
10. Minnesota (1851).
11. Missouri (1835).
12. Montana (1864).
13. Nevada (1861).

et al., Appellants,

v.

Arth¹¹⁷⁹ as Attorney General
of the State of Georgia, et al.

No. 70-40.

Argued Dec. 13, 1971.

Reargued Oct. 11, 1972.

Rehearing Denied Feb. 26, 1973.

See 410 U.S. 959, 93 S.Ct. 1410.

Action was brought challenging validity of Georgia abortion statute. The United States District Court for the Northern District of Georgia, 319 F. Supp. 1048, as a three-judge court, rendered judgment holding portions of the statute invalid and plaintiffs appealed. The Supreme Court, Mr. Justice Blackmun, held that those portions of the statute requiring that abortions be conducted in hospitals, or accredited hospitals, requiring the interposition of a hospital abortion committee, requiring confirmation by other physicians, and limiting abortion to Georgia residents, are unconstitutional, while provision requiring that physician's decision rest upon his best clinical judgment of necessity is not unconstitutionally vague.

Judgment modified and affirmed.

Mr. Chief Justice Burger, Mr. Justice Douglas and Mr. Justice Stewart filed concurring opinions; Mr. Justice White dissented and filed an opinion in which Mr. Justice Rehnquist joined, and Mr. Justice Rehnquist dissented and filed an opinion.

1. Constitutional Law §42.1(3) Courts §281

Pregnant Georgia citizen, on behalf of herself and others similarly situated,

14. New Hampshire (1848).
15. New Jersey (1849).
16. Ohio (1841).
17. Pennsylvania (1860).
18. Texas (1859).
19. Vermont (1867).
20. West Virginia (1848).
21. Wisconsin (1858).

DOE v. BOLTON

had standing to maintain action challenging Georgia abortion statutes, and presented justiciable controversy. Code Ga. §§ 26-1201 to 26-1203.

2. Courts ⇐281

Georgia-licensed doctors consulted by pregnant women presented justiciable controversy and had standing to maintain action challenging Georgia abortion statute although they had not been prosecuted or threatened with prosecution. Code Ga. §§ 26-1201 to 26-1203.

3. Appeal and Error ⇐843(2)

Supreme Court, which determined that pregnant woman and doctors had standing to challenge abortion statute, would not pass upon status of nurses, clergymen, and others who joined as plaintiffs.

4. Abortion ⇐1

Pregnant woman does not have absolute constitutional right to abortion on her demand.

5. Abortion ⇐1

State has right to readjust its views and emphases in light of advanced knowledge and techniques and fact that earlier Georgia abortion statute focused on preservation of woman's life did not prevent state from later justifying abortion statute in interest of protection of embryonic and fetal life.

6. Criminal Law ⇐13.1(2)

Provision of Georgia abortion statute making it a crime for a physician to perform an abortion except when it is based upon his best clinical judgment that abortion is necessary is not unconstitutionally vague, since his judgment may be made in light of all attendant circumstances. Code Ga. § 26-1202(a)

7. Abortion ⇐1

Constitutional Law ⇐208(1)

Provision of Georgia abortion statute requiring that abortions, unlike other surgical procedures, be done only in hospital accredited by private accreditation organization is invalid as not based on differences reasonably related to purposes of act in which it is found, in absence of showing that only hospitals (let

alone those with accreditation) aid state's interest in fully protecting patient; while state may adopt standards for licensing all facilities where abortions, from and after end of first trimester of pregnancy, may be performed so long as these standards are legitimately related to state's objective, hospital requirement failing to exclude first trimester of pregnancy would be invalid on that ground alone. Code Ga. §§ 26-1201 to 26-1203; U.S.C. A.Const. Amend. 14.

8. Abortion ⇐1

Hospital requirement of Georgia abortion law is invalid for failure to exclude first trimester of pregnancy. Code Ga. §§ 26-1201 to 26-1203.

9. Abortion ⇐1

Georgia abortion statute requiring advance approval by hospital abortion committee lacks constitutionally justifiable pertinence and is unduly restrictive of patient's rights and needs which have already been medically delineated and substantiated by patient's personal physician. Code Ga. § 26-1202(b)(5), (e).

10. Abortion ⇐1

Under Georgia statutes, hospital is free not to admit patient for abortion and physician and any other employee has right to refrain, for moral or religious reasons, from participating in abortion procedure; these provisions sufficiently protect hospital and obviate need for abortion committee. Code Ga. § 26-1202(b)(5), (e).

11. Physicians and Surgeons ⇐2

Requirement of Georgia abortion statute that two Georgia licensed physicians confirm recommendation of pregnant woman's own consultant, a procedure not required in any other voluntary medical or surgical procedure, has no rational connection with patient's needs and unduly infringes on physician's right to practice. Code Ga. §§ 26-1201 to 26-1203.

12. Abortion ⇐1

Constitutional Law ⇐207(1)

Residency requirement of Georgia abortion law, not based on any policy of

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Held: The judgment is reversed.
851 F. 2d 1071, reversed.

THE CHIEF JUSTICE delivered the opinion of the Court with respect to Parts I, II-A, II-B, and II-C, concluding that:

1. This Court need not pass on the constitutionality of the Missouri statute's preamble. In invalidating the preamble, the Court of Appeals misconceived the meaning of the dictum in *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U. S. 416, 444, that "a State may not adopt one theory of when life begins to justify its regulation of abortions." That statement means only that a State could not "justify" any abortion regulation otherwise invalid under *Roe v. Wade* on the ground that it embodied the State's view about when life begins. The preamble does not by its terms regulate abortions or any other aspect of appellees' medical practice, and § 1.205.2 can be interpreted to do no more than offer protections to unborn children in tort and probate law, which is permissible under *Roe v. Wade, supra*, at 161-162. This Court has emphasized that *Roe* implies no limitation on a State's authority to make a value judgment favoring childbirth over abortion, *Maier v. Roe*, 432 U. S. 464, 474, and the preamble can be read simply to express that sort of value judgment. The extent to which the preamble's language might be used to interpret other state statutes or regulations is something that only the state courts can definitively decide, and, until those courts have applied the preamble to restrict appellees' activities in some concrete way, it is inappropriate for federal courts to address its meaning. *Alabama State Federation of Labor v. McAdory*, 325 U. S. 450, 460. Pp. 6-9.

PREAMBLE

a State's authority
favoring childbirth over abortion

2. The restrictions in §§ 188.210 and 188.215 of the Missouri statute on the use of public employees and facilities for the performance or assistance of nontherapeutic abortions do not contravene this Court's abortion decisions. The Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government may not deprive the individual. *DeShaney v. Winnebago County Dept. of Social Services*, 489 U. S. —, —. Thus, in *Maier v. Roe, supra*; *Poelker v. Doe*, 432 U. S. 519; and *Harris v. McRae*, 448 U. S. 297, this Court upheld governmental regulations withholding public funds for nontherapeutic abortions but allowing payments for medical services related to childbirth, recognizing that a government's decision to favor childbirth over abortion through the allocation of public funds does not violate *Roe v. Wade*. A State may implement that same value judgment through the allocation of other public resources, such as hospitals and medical staff. There is no merit to the claim that *Maier*, *Poelker*, and *McRae* must be distinguished on the grounds that preventing access to a public

COURT CASES - ABORTION

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Reproductive Health Services

RECEIVED

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

**WEBSTER, ATTORNEY GENERAL OF MISSOURI, ET
AL. v. REPRODUCTIVE HEALTH SERVICES ET AL.**

**APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT**

No. 88-605. Argued April 26, 1989—Decided July 3, 1989

Appellees, state-employed health professionals and private nonprofit corporations providing abortion services, brought suit in the District Court for declaratory and injunctive relief challenging the constitutionality of a Missouri statute regulating the performance of abortions. The statute, *inter alia*: (1) sets forth "findings" in its preamble that "[t]he life of each human being begins at conception," and that "unborn children have protectable interests in life, health, and well-being," §§ 1.205.1(1), 1.205.1(2), and requires that all state laws be interpreted to provide unborn children with the same rights enjoyed by other persons, subject to the Federal Constitution and this Court's precedents, § 1.205.2; (2) specifies that a physician, prior to performing an abortion on any woman whom he has reason to believe is 20 or more weeks pregnant, must ascertain whether the fetus is "viable" by performing "such medical examinations and tests as are necessary to make a finding of [the fetus'] gestational age, weight, and lung maturity," § 188.029; (3) prohibits the use of public employees and facilities to perform or assist abortions not necessary to save the mother's life, §§ 188.210, 188.215; and (4) makes it unlawful to use public funds, employees, or facilities for the purpose of "encouraging or counseling" a woman to have an abortion not necessary to save her life, §§ 188.205, 188.210, 188.215. The District Court struck down each of the above provisions, among others, and enjoined their enforcement. The Court of Appeals affirmed, ruling that the provisions in question violated this Court's decisions in *Roe v. Wade*, 410 U. S. 113, and subsequent cases.

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THE CHIEF JUSTICE, joined by JUSTICE WHITE and JUSTICE KENNEDY, concluded in Parts II-D and III that:

1. Section 188.029 of the Missouri statute—which specifies, in its first sentence, that a physician, before performing an abortion on a woman he has reason to believe is carrying an unborn child of 20 or more weeks gestational age, shall first determine if the unborn child is viable by using that degree of care, skill, and proficiency that is commonly exercised by practitioners in the field; but which then provides, in its second sentence, that, in making the viability determination, the physician shall perform such medical examinations and tests as are necessary to make a finding of the unborn child's gestational age, weight, and lung maturity—is constitutional, since it permissibly furthers the State's interest in protecting potential human life. Pp. 15–23.

STATES INTEREST
IN PROTECTING HUMAN
LIFE

(a) The Court of Appeals committed plain error in reading § 188.029 as requiring that after 20 weeks the specified tests *must* be performed. That section makes sense only if its second sentence is read to require only those tests that are useful in making subsidiary viability findings. Reading the sentence to require the tests *in all circumstances*, including when the physician's reasonable professional judgment indicates that they would be irrelevant to determining viability or even dangerous to the mother and the fetus, would conflict with the first sentence's requirement that the physician apply his reasonable professional skill and judgment. It would also be incongruous to read the provision, especially the word “necessary,” to require tests irrelevant to the expressed statutory purpose of determining viability. Pp. 16–17.

(b) Section 188.029 is reasonably designed to ensure that abortions are not performed where the fetus is viable. The section's tests are intended to determine viability, the State having chosen viability as the point at which its interest in potential human life must be safeguarded. The section creates what is essentially a presumption of viability at 20 weeks, which the physician, prior to performing an abortion, must rebut with tests—including, if feasible, those for gestational age, fetal weight, and lung capacity—indicating that the fetus is not viable. While the District Court found that uncontradicted medical evidence established that a 20-week fetus is *not* viable, and that 23 1/2 to 24 weeks' gestation is the earliest point at which a reasonable possibility of viability exists, it also found that there may be a 4-week error in estimating gestational age, which supports testing at 20 weeks. Pp. 17–18.

VIABILITY — BY STATE
SAFEGUARDED
PRESUMED @ 20 WKS

(c) Section 188.029 conflicts with *Roe v. Wade* and cases following it. Since the section's tests will undoubtedly show in many cases that the fetus is not viable, the tests will have been performed for what were in fact second-trimester abortions. While *Roe*, 410 U. S., at 162, recognized the State's interest in protecting potential human life as “impor-

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facility narrows or forecloses the availability of abortion. Just as in those cases, Missouri's decision to use public facilities and employees to encourage childbirth over abortion places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy, but leaves her with the same choices as if the State had decided not to operate any hospitals at all. The challenged provisions restrict her ability to obtain an abortion only to the extent that she chooses to use a physician affiliated with a public hospital. Also without merit is the assertion that *Maher*, *Poelker*, and *McRae*, must be distinguished on the ground that, since the evidence shows that all of a public facility's costs in providing abortion services are recouped when the patient pays such that no public funds are expended, the Missouri statute goes beyond expressing a preference for childbirth over abortion by creating an obstacle to the right to choose abortion that cannot stand absent a compelling state interest. Nothing in the Constitution requires States to enter or remain in the abortion business or entitles private physicians and their patients to access to public facilities for the performance of abortions. Indeed, if the State does recoup all of its costs in performing abortions and no state subsidy, direct or indirect, is available, it is difficult to see how any procreational choice is burdened by the State's ban on the use of its facilities or employees for performing abortions. The cases in question all support the view that the State need not commit any resources to performing abortions, even if it can turn a profit by doing so. Pp. 9-13.

3. The controversy over § 188.205's prohibition on the use of public funds to encourage or counsel a woman to have a nontherapeutic abortion is moot. The Court of Appeals did not consider § 188.205 separately from §§ 188.210 and 188.215—which respectively prohibit the use of public employees and facilities for such counseling—in holding all three sections unconstitutionally vague and violative of a woman's right to choose an abortion. Missouri has appealed only the invalidation of § 188.205. In light of the State's claim, which this Court accepts for purposes of decision, that § 188.205 is not directed at the primary conduct of physicians or health care providers, but is simply an instruction to the State's fiscal officers not to allocate public funds for abortion counseling, appellees contend that they are not "adversely" affected by the section and therefore that there is no longer a case or controversy before the Court on this question. Since plaintiffs are masters of their complaints even at the appellate stage, and since appellees no longer seek equitable relief on their § 188.205 claim, the Court of Appeals is directed to vacate the District Court's judgment with instructions to dismiss the relevant part of the complaint with prejudice. *Deakins v. Monaghan*, 484 U. S. 193, 200. Pp. 13-14.

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an abortion, *Akron, supra*, at 420, n. 1, a "limited fundamental constitutional right," *post*, at 18, or a liberty interest protected by the Due Process Clause. Moreover, although this decision will undoubtedly allow more governmental regulation of abortion than was permissible before, the goal of constitutional adjudication is not to remove inexorably "politically divisive" issues from the ambit of the legislative process, but is, rather, to hold true the balance between that which the Constitution puts beyond the reach of the democratic process and that which it does not. Furthermore, the suggestion that legislative bodies, in a Nation where more than half the population is female, will treat this decision as an invitation to enact abortion laws reminiscent of the dark ages misreads the decision and does scant justice to those who serve in such bodies and the people who elect them. Pp. 21-23.

2. This case affords no occasion to disturb *Roe's* holding that a Texas statute which criminalized *all* nontherapeutic abortions unconstitutionally infringed the right to an abortion derived from the Due Process Clause. *Roe* is distinguishable on its facts, since Missouri has determined that viability is the point at which its interest in potential human life must be safeguarded. P. 23.

JUSTICE O'CONNOR, agreeing that it was plain error for the Court of Appeals to interpret the second sentence of § 188.029 as meaning that doctors *must* perform tests to find gestational age, fetal weight, and lung maturity, concluded that the section was constitutional as properly interpreted by the plurality, and that the plurality should therefore not have proceeded to reconsider *Roe v. Wade*. This Court refrains from deciding constitutional questions where there is no need to do so, and generally does not formulate a constitutional rule broader than the precise facts to which it is to be applied. *Ashwander v. TVA*, 297 U. S. 288, 346, 347. Since appellees did not appeal the District Court's ruling that the first sentence of § 188.029 is constitutional, there is no dispute between the parties over the presumption of viability at 20 weeks created by that first sentence. Moreover, as properly interpreted by the plurality, the section's second sentence does nothing more than delineate means by which the unchallenged 20-week presumption may be overcome if those means are useful in determining viability and can be prudently employed. As so interpreted, the viability testing requirements do not conflict with any of the Court's abortion decisions. As the plurality recognizes, under its interpretation of § 188.029's second sentence, the viability testing requirements promote the State's interest in potential life. This Court has recognized that a State may promote that interest when viability is possible. *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U. S. 747, 770-771. Similarly, the basis for reliance by the lower courts on *Colautti v. Franklin*, 439 U. S. 379,

Missouri has determined that viability is the point at which its interest in potential human life must be safeguarded

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tant and legitimate," it also limited state involvement in second-trimester abortions to protecting maternal health, *id.*, at 164, and allowed States to regulate or proscribe abortions to protect the unborn child only after viability, *id.*, at 165. Since the tests in question regulate the physician's discretion in determining the viability of the fetus, § 188.029 conflicts with language in *Colautti v. Franklin*, 439 U. S. 379, 388-389, stating that the viability determination is, and must be, a matter for the responsible attending physician's judgment. And, in light of District Court findings that the tests increase the expenses of abortion, their validity may also be questioned under *Akron*, *supra*, at 434-435, which held that a requirement that second-trimester abortions be performed in hospitals was invalid because it substantially increased the expenses of those procedures. Pp. 17-19.

(d) The doubt cast on the Missouri statute by these cases is not so much a flaw in the statute as it is a reflection of the fact that *Roe's* rigid trimester analysis has proved to be unsound in principle and unworkable in practice. In such circumstances, this Court does not refrain from reconsidering prior constitutional rulings, notwithstanding *stare decisis*. *E. g.*, *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U. S. 528. The *Roe* framework is hardly consistent with the notion of a Constitution like ours that is cast in general terms and usually speaks in general principles. The framework's key elements—trimesters and viability—are not found in the Constitution's text, and, since the bounds of the inquiry are essentially indeterminate, the result has been a web of legal rules that have become increasingly intricate, resembling a code of regulations rather than a body of constitutional doctrine. There is also no reason why the State's compelling interest in protecting potential human life should not extend throughout pregnancy rather than coming into existence only at the point of viability. Thus, the *Roe* trimester framework should be abandoned. Pp. 19-21.

(e) There is no merit to the dissent's contention that the Court should join in a "great issues" debate as to whether the Constitution includes an "unenumerated" general right to privacy as recognized in cases such as *Griswold v. Connecticut*, 381 U. S. 479. Unlike *Roe*, *Griswold* did not purport to adopt a whole framework, complete with detailed rules and distinctions, to govern the cases in which the asserted liberty interest would apply. The *Roe* framework sought to deal with areas of medical practice traditionally left to the States, and to balance once and for all, by reference only to the calendar, the State's interest in protecting potential human life against the claims of a pregnant woman to decide whether or not to abort. The Court's experience in applying *Roe* in later cases suggests that there is wisdom in not necessarily attempting to elaborate the differences between a "fundamental right" to

VIABILITY, CONT

(TO STATE PG. 18530)
LINE 29STATES COMPELLING
INTERESTROE'S TRIMESTER FRAME-
WORK SHOULD BE
ABANDONED

Syllabus

388-389, disappears when § 188.029 is properly interpreted to require only *subsidiary* viability findings, since the State has not attempted to substitute its judgment for the physician's ascertainment of viability, which therefore remains "the critical point." Nor does the marginal increase in the cost of an abortion created by § 188.029's viability testing provision, as interpreted, conflict with *Akron v. Akron Center for Reproductive Health*, 462 U. S. 416, 434-439, since, here, such costs do not place a "heavy, and unnecessary burden" on a woman's abortion decision, whereas the statutory requirement in *Akron*, which related to previability abortions, more than doubled a woman's costs. Moreover, the statutory requirement in *Akron* involved second-trimester abortions generally; § 188.029 concerns only tests and examinations to determine viability when viability is possible. The State's compelling interest in potential life postviability renders its interest in determining the critical point of viability equally compelling. *Thornburgh, supra*, at 770-771. When the constitutional invalidity of a State's abortion statute actually turns upon the constitutional validity of *Roe*, there will be time enough to reexamine *Roe*, and to do so carefully. Pp. 4-11.

JUSTICE SCALIA would reconsider and explicitly overrule *Roe v. Wade*. Avoiding the *Roe* question by deciding this case in as narrow a manner as possible is not required by precedent and not justified by policy. To do so is needlessly to prolong this Court's involvement in a field where the answers to the central questions are political rather than juridical, and thus to make the Court the object of the sort of organized pressure that political institutions in a democracy ought to receive. It is particularly perverse to decide this case as narrowly as possible in order to avoid reading the inexpressibly "broader-than-was-required-by-the-precise-facts" structure established by *Roe v. Wade*. The question of *Roe*'s validity is presented here, inasmuch as § 188.029 constitutes a legislative imposition on the judgment of the physician concerning the point of viability, and increases the cost of an abortion. It does palpable harm, if the States can and would eliminate largely unrestricted abortion, skillfully to refrain from telling them so. Pp. 1-7.

REHNQUIST, C. J., announced the judgment of the Court and delivered the opinion for a unanimous Court with respect to Part II-C, the opinion of the Court with respect to Parts I, II-A, and II-B, in which WHITE, O'CONNOR, SCALIA, and KENNEDY, JJ., joined, and an opinion with respect to Parts II-D and III, in which WHITE and KENNEDY, JJ., joined. O'CONNOR, J., and SCALIA, J., filed opinions concurring in part and concurring in the judgment. BLACKMUN, J., filed an opinion concurring in part and dissenting in part, in which BRENNAN and MARSHALL, JJ., joined. STEVENS, J., filed an opinion concurring in part and dissenting in part.

505 U.S. 833

PLANNED PARENTHOOD v. CASEY

2791

Cite as 112 S.Ct. 2791 (1992)

505 U.S. 833, 120 L.Ed.2d 674

¹⁸³³PLANNED PARENTHOOD OF
SOUTHEASTERN PENNSYL-
VANIA, et al., Petitioners,

v.

Robert P. CASEY, et al., etc.

Robert P. CASEY, et al., etc., Petitioners,

v.

PLANNED PARENTHOOD OF SOUTH-
EASTERN PENNSYLVANIA et al.

Nos. 91-744, 91-902.

Argued April 22, 1992.

Decided June 29, 1992.

Abortion clinics and physician challenged, on due process grounds, the constitutionality of the 1988 and 1989 amendments to the Pennsylvania abortion statute. The United States District Court for the Eastern District of Pennsylvania, Daniel H. Huyett, 3d, J., 744 F.Supp. 1323, held that several sections of the statute were unconstitutional. Pennsylvania appealed. The Court of Appeals for the Third Circuit, 947 F.2d 682, affirmed in part and reversed in part. Certiorari was granted. The Supreme Court, Justices O'Connor, Kennedy and Souter held that: (1) the doctrine of stare decisis requires reaffirmance of *Roe v. Wade's* essential holding recognizing a woman's right to choose an abortion before fetal viability; (2) the undue burden test, rather than the trimester framework, should be used in evaluating abortion restrictions before viability; (3) the medical emergency definition in the Pennsylvania statute was sufficiently broad that it did not impose an undue burden; (4) the informed consent requirements, the 24-hour waiting period, parental consent provision, and the reporting and recordkeeping requirements of the Pennsylvania statute did not impose an undue burden; and (5) the spousal notification provision imposed an undue burden and was invalid.

Affirmed in part, reversed in part, and remanded.

Justice Stevens filed an opinion concurring in part and dissenting in part.

Justice Blackmun filed an opinion concurring in part, concurring in the judgment in part, and dissenting in part.

Chief Justice Rehnquist filed an opinion concurring in the judgment in part and dissenting in part, in which Justices White, Scalia and Thomas joined.

Justice Scalia filed an opinion concurring in the judgment in part and dissenting in part, in which Chief Justice Rehnquist and Justices White and Thomas joined.

1. Abortion and Birth Control §.50

Woman has right to choose to have abortion before viability of fetus without undue interference from state; before viability, state's interests are not strong enough to support prohibition of abortion or imposition of substantial obstacle to woman's effective right to elect procedure. U.S.C.A. Const. Amend. 14.

2. Abortion and Birth Control §.50

State has power to restrict abortions after fetal viability, if law contains exceptions for pregnancies that endanger woman's life or health. U.S.C.A. Const. Amend. 14.

3. Abortion and Birth Control §.50

State has legitimate interests from the outset of the pregnancy in protecting health of woman and life of fetus that may become child. U.S.C.A. Const. Amend. 14.

4. Constitutional Law §254.1

Substantive liberties protected by Fourteenth Amendment, which incorporates most of Bill of Rights against states, are not limited to those rights already guaranteed against federal interference by express provisions of first eight amendments to Constitution. U.S.C.A. Const. Amends. 1-8, 14.

Digest

5. Constitutional Law 254.1

Substantive liberties protected by Fourteenth Amendment are not limited to those practices, defined at the most specific level, that were protected against government interference by other rules of law when Fourteenth Amendment was ratified. U.S.C.A. Const.Amend. 14.

6. Constitutional Law 254.1, 274(5)

Constitution places limits on state's right to interfere with person's most basic decisions about family and parenthood, as well as bodily integrity. U.S.C.A. Const.Amend. 14.

7. Courts 89, 90(3)

Rule of stare decisis is not inexorable command and certainly it is not such in every constitutional case; rather, when Supreme Court reexamines prior holding, its judgment is customarily informed by prudential and pragmatic considerations designed to test consistency of overruling prior decision with ideal of the rule of law, and to gauge respective costs of reaffirming and overruling prior case.

8. Courts 90(1)

Under doctrine of stare decisis, when Supreme Court reexamines prior holding, it may ask whether rule has proved to be intolerable simply in defying practical workability, whether rule is subject to a kind of reliance that would lend special hardship to consequences of overruling and would add inequity to cost of repudiation, whether related principles of law have so far developed that they have left the old rule no more than a remnant of abandoned doctrine, and whether facts have so changed or come to be seen differently as to have robbed old rule of significant application or justification.

9. Abortion and Birth Control 50

Courts 90(1)

Opposition to *Roe v. Wade* did not render decision unworkable and, therefore, doctrine of stare decisis required reaffirmance.

10. Abortion and Birth Control 50

Courts 90(1)

Reliance on *Roe v. Wade* rule's limitation on state power required reaffirmance of *Roe*'s essential holding under doctrine of stare decisis; for two decades of economic and social developments, people organized intimate relationships and made choices that defined their views of themselves and their places in society in reliance on availability of abortion in event of contraceptive failure.

11. Abortion and Birth Control 50

Courts 90(1)

No evolution of legal principle weakened doctrinal footings of *Roe v. Wade* and, therefore, application of stare decisis required reaffirmance, whether *Roe* was viewed as example of right of person to be free from unwarranted governmental intrusion into matters as fundamental as decision whether to bear or beget child, whether it was viewed as rule of personal autonomy and bodily integrity that would limit governmental power to mandate medical treatment or to bar its rejection, or if it was viewed as *sui generis*.

12. Abortion and Birth Control 50

Courts 90(1)

Advances in maternal health care and in neonatal care that may have affected factual assumptions of *Roe v. Wade* did not render *Roe*'s central holding obsolete and did not warrant overruling it; those facts had no bearing on validity of *Roe*'s central holding that viability marked earliest point at which state's interest in fetal life would be constitutionally adequate to justify legislative ban on nontherapeutic abortions.

13. Abortion and Birth Control 50

Courts 90(1)

Neither factual underpinnings of *Roe v. Wade*, nor Supreme Court's understanding of it, had been changed to such a degree that would warrant overruling decision; present doctrinal disposition to reach different result was insufficient to warrant overruling.

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Roe v. Wade rule's limitation required reaffirmance of holding under doctrine of two decades of economic developments, people organized themselves and made choices that were of themselves and their in reliance on availability of not of contraceptive failure.

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of legal principle weakened of *Roe v. Wade* and, therefore, of stare decisis required whether *Roe* was viewed as that of person to be free from over fetal intrusion into woman's decision whether to have a child, whether it was viewed as personal autonomy and bodily integrity would limit governmental power of medical treatment or to bar its if it was viewed as sui generis.

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on maternal health care and in what may have affected factual holding of *Roe v. Wade* did not render holding obsolete and did not nullify it; those facts had no identity of *Roe*'s central holding marked earliest point at which in fetal life would be constitute to justify legislative ban on abortions.

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actual underpinnings of *Roe v. Wade* Supreme Court's understanding of range to such a degree that of a decision; present situation reach different result to warrant overruling.

14. Abortion and Birth Control ≈.50

Courts ≈90(6)

Overruling *Roe v. Wade* in response to divisiveness of abortion issue would address error, if error there was, at cost of profound and unnecessary damage to Supreme Court's legitimacy, and to nation's commitment to rule of law; only the most convincing justification under accepted standards of precedent could suffice to demonstrate that overruling would be anything other than surrender to political pressure and unjustified repudiation of principle.

15. Abortion and Birth Control ≈.50

Woman's constitutional liberty to terminate her pregnancy is not so unlimited as to prevent state from showing its concern for life of the unborn and, at later point in fetal development, state's interest in life may have sufficient force to allow restrictions on woman's right to terminate pregnancy. (Per Justices O'Connor, Kennedy and Souter.) U.S.C.A. Const.Amend. 14.

16. Abortion and Birth Control ≈.50

Viability is point of fetal development at which state's interest in life has sufficient force that woman's right to terminate her pregnancy may be restricted; (viability is time at which there is realistic possibility of maintaining and nourishing life outside the womb, so that independent existence of second life can in reason and fairness be object of state protection that would override woman's right to terminate her pregnancy.) (Per Justices O'Connor, Kennedy and Souter.) U.S.C.A. Const.Amend. 14.

17. Abortion and Birth Control ≈.50

Rigid trimester framework established in *Roe v. Wade* is not necessary to ensure that woman's right to choose to terminate or continue her pregnancy is not so subordinated to state's interest in fetal life that choice exists in theory but not in fact; rather, *Roe* recognizes state's interest in promoting fetal life and measures aimed at ensuring that woman's choice contemplates consequences for fetus do not necessarily interfere with right to terminate pregnancy, even if those

measures would have been inconsistent with trimester framework. (Per Justices O'Connor, Kennedy and Souter.) U.S.C.A. Const.Amend. 14.

18. Constitutional Law ≈255(1)

Not every law which makes right more difficult to exercise is, ipso facto, an infringement of that right. U.S.C.A. Const.Amend. 14.

19. Abortion and Birth Control ≈.50

Constitutional Law ≈274(5)

Only when state regulation of abortion imposes undue burden on woman's ability to decide whether to terminate pregnancy does power of state reach into heart of liberty protected by due process clause; fact that regulation has incidental effect of making it more difficult or more expensive to procure abortion cannot be enough to invalidate it. (Per Justices O'Connor, Kennedy and Souter.) U.S.C.A. Const.Amend. 14.

20. Abortion and Birth Control ≈.50

Undue burden standard is appropriate means of reconciling state's interest in human life with woman's constitutionally protected liberty to decide whether to terminate pregnancy. (Per Justices O'Connor, Kennedy and Souter.) U.S.C.A. Const.Amend. 14.

21. Abortion and Birth Control ≈.50

State regulation imposes "undue burden" on woman's decision whether to terminate pregnancy and, thus, regulation is invalid if it has purpose or effect of placing substantial obstacle in path of woman who seeks abortion of nonviable fetus. (Per Justices O'Connor, Kennedy and Souter.) U.S.C.A. Const.Amend. 14.

See publication Words and Phrases for other judicial constructions and definitions.

22. Abortion and Birth Control ≈.50

Regulations which do no more than create structural mechanism by which state, or parent or guardian of minor, may express profound respect for life of unborn are per-

VIABILITY

mitted if they are not substantial obstacle to woman's exercise of right to choose to terminate pregnancy before fetal viability; unless regulations are substantial obstacle, state measure designed to persuade woman to choose childbirth over abortion will be upheld if reasonably related to goal of furthering state's interest in fetal life. (Per Justices O'Connor, Kennedy and Souter.) U.S.C.A. Const.Amend. 14.

23. Abortion and Birth Control ⇌.50

State regulations that are designed to foster health of woman who seeks abortion before fetal viability are valid if they do not constitute undue burden on woman's right to choose. (Per Justices O'Connor, Kennedy and Souter.) U.S.C.A. Const.Amend. 14.

24. Abortion and Birth Control ⇌.50

informed consent
To promote state's profound interest in potential life, throughout pregnancy state may take measures to ensure that woman's choice is informed, and measures designed to advance that interest will not be invalidated as long as their purpose is to persuade woman to choose childbirth over abortion without placing undue burden on right to terminate pregnancy. (Per Justices O'Connor, Kennedy and Souter.) U.S.C.A. Const.Amend. 14.

25. Abortion and Birth Control ⇌.50

Unnecessary health regulations that have purpose or effect of presenting substantial obstacle to woman who seeks abortion before viability impose undue burden on that right and are invalid. (Per Justices O'Connor, Kennedy and Souter.) U.S.C.A. Const.Amend. 14.

26. Abortion and Birth Control ⇌.50

Regardless of whether exceptions are made for particular circumstances, state may not prohibit any woman from making ultimate decision to terminate her pregnancy before viability. (Per Justices O'Connor, Kennedy and Souter.) U.S.C.A. Const.Amend. 14.

27. Abortion and Birth Control ⇌.50

After fetal viability, state in promoting its interest in potentiality of human life may, if it chooses, regulate and even proscribe abortion, except where it is necessary, in appropriate medical judgment, for preservation of life or health of mother. (Per Justices O'Connor, Kennedy and Souter.) U.S.C.A. Const.Amend. 14.

28. Abortion and Birth Control ⇌.1.30

Medical emergency definition in Pennsylvania's abortion statute was sufficiently broad to cover medical conditions of preeclampsia, inevitable abortion, and premature ruptured membrane and, therefore, definition imposed no undue burden on woman's abortion right. 18 Pa.C.S.A. § 3203; U.S.C.A. Const.Amend. 14.

29. Abortion and Birth Control ⇌.1.30

informed consent
Informed consent provisions of Pennsylvania's abortion statute that require giving of truthful, nonmisleading information about nature of abortion procedure, about attendant health risks of abortion and of childbirth, and about probable gestational age of fetus do not impose undue burden on woman's right to choose to terminate her pregnancy; overruling *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 103 S.Ct. 2481, 76 L.Ed.2d 687; *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 106 S.Ct. 2169, 90 L.Ed.2d 779. (Per Justices O'Connor, Kennedy and Souter, with the Chief Justice and three Justices concurring in the judgment.) 18 Pa.C.S.A. § 3205(a); U.S.C.A. Const.Amend. 14.

30. Abortion and Birth Control ⇌.50

informed consent
Requiring doctors to inform woman who seeks abortion about availability of information related to fetal development and consequences to fetus, and assistance available if woman decides to carry pregnancy to full term, is reasonable measure to ensure informed choice and does not impose undue burden on woman's right to abortion. (Per Justices O'Connor, Kennedy and Souter, with the Chief Justice and three Justices concurring.)

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§ 3205(a); U.S.C.A. Const.Amend. 14.

31. Abortion and Birth Control \Rightarrow 1.30

Informed consent provision of Pennsyl-
vania's abortion statute does not prevent
physician from exercising his or her medical
judgment, and, thus, does not impose undue
burden on woman's abortion right; statute
does not require physician to comply with
informed consent provisions if he or she can
demonstrate by preponderance of evidence
that he or she reasonably believed that fur-
nishing information would have resulted in
severely adverse effect on physical or mental
health of patient. (Per Justices O'Connor,
Kennedy and Souter, with the Chief Justice
and three Justices concurring in the judg-
ment.) 18 Pa.C.S.A. § 3205(a); U.S.C.A.
Const.Amend. 14.

32. Abortion and Birth Control \Rightarrow 1.30**Constitutional Law** \Rightarrow 90.1(1)

Informed consent provision of Pennsyl-
vania's abortion statute implicates physician's
First Amendment rights not to speak only as
part of practice of medicine, which is licensed
and regulated by state and, therefore, there
is no constitutional infirmity in requirement
that physician provide information about
risks of abortion in childbirth. (Per Justices
O'Connor, Kennedy and Souter, with the
Chief Justice and three Justices concurring
in the judgment.) 18 Pa.C.S.A. § 3205(a);
U.S.C.A. Const.Amend. 1.

33. Abortion and Birth Control \Rightarrow 1.30

Informed consent provision of Pennsyl-
vania's abortion statute that requires physi-
cian, as opposed to qualified assistant, to
provide information relevant to woman's in-
formed consent does not impose undue bur-
den on woman's right to abortion; rather,
provision is reasonable means to insure that
woman's consent is informed. (Per Justices
O'Connor, Kennedy and Souter, with the
Chief Justice and three Justices concurring
in the judgment.) 18 Pa.C.S.A. § 3205;
U.S.C.A. Const.Amend. 14.

34. Abortion and Birth Control \Rightarrow 1.30

Pennsylvania abortion statute's 24-hour
waiting period does not impose undue burden
on woman's abortion right, even though wait-
ing period has effect of increasing cost and
risk of delayed abortions. (Per Justices
O'Connor, Kennedy and Souter, with the
Chief Justice and three Justices concurring
in the judgment.) 18 Pa.C.S.A. § 3205(a);
U.S.C.A. Const.Amend. 14.

35. Abortion and Birth Control \Rightarrow 1.30

Spousal notification provision of Penn-
sylvania's abortion statute places undue bur-
den on woman's abortion right and is invalid;
whether prospect of notification itself deters
women who have been abused or women
whose children have been abused from seek-
ing abortions, or whether husband, through
physical force or psychological pressure or
economic coercion, prevents his wife from
obtaining abortion until it is too late, spousal
notice requirement would often be tanta-
mount to giving husband veto over decision.
18 Pa.C.S.A. §§ 3209, 3214(a)(12); U.S.C.A.
Const.Amend. 14.

36. Abortion and Birth Control \Rightarrow 1.30

Fact that spousal notification provision
of Pennsylvania's abortion statute may have
affected only one percent of women seeking
abortions who were married and who would
choose not to notify their husbands of their
plans did not prevent notification provision
from imposing undue burden on woman's
decision to terminate pregnancy; provision
had to be judged by reference to those for
whom it was actual, rather than irrelevant,
restriction. 18 Pa.C.S.A. §§ 3209,
3214(a)(12); U.S.C.A. Const.Amend. 14.

37. Abortion and Birth Control \Rightarrow 1.30

Husband's deep and proper concern and
interest in his wife's pregnancy and in fetus
did not justify undue burden imposed by
Pennsylvania abortion statute's spousal noti-
fication provision; husband's interest in fetus
did not permit state to give husband effective
veto over abortion decision. 18 Pa.C.S.A.

§§ 3209, 3214(a)(12); U.S.C.A. Const.Amend. 14.

38. Abortion and Birth Control ¶1.30

Pennsylvania abortion statute's one-parent consent requirement and judicial bypass procedure do not impose undue burden on right of unemancipated young woman under age of 18 to obtain abortion. (Per Justices O'Connor, Kennedy and Souter, with the Chief Justice and three Justices concurring in the judgment.) 18 Pa.C.S.A. § 3206; U.S.C.A. Const.Amend. 14.

39. Abortion and Birth Control ¶1.30

Recordkeeping and reporting requirements of Pennsylvania's abortion statute, except for that provision requiring reporting of married woman's reason for failure to provide notice to her husband, do not impose undue burden of woman's abortion right; recordkeeping and reporting requirements do not impose substantial obstacle to woman's choice, but reporting requirement with respect to reason for failure to give notice to husband would provide Pennsylvania with precise information that many women may have pressing reasons not to reveal. (Per Justices O'Connor, Kennedy and Souter, with one Justice joining and the Chief Justice and three Justices concurring in the judgment.) 18 Pa.C.S.A. §§ 3207, 3214, 3214(a)(12); U.S.C.A. Const.Amend. 14.

Syllabus *

At issue are five provisions of the Pennsylvania Abortion Control Act of 1982: § 3205, which requires that a woman seeking an abortion give her informed consent prior to the procedure, and specifies that she be provided with certain information at least 24 hours before the abortion is performed; § 3206, which mandates the informed consent of one parent for a minor to obtain an abortion, but provides a judicial bypass procedure; § 3209, which commands that, unless certain exceptions apply, a married wom-

an seeking an abortion must sign a statement indicating that she has notified her husband; § 3203, which defines a "medical emergency" that will excuse compliance with the foregoing requirements; and §§ 3207(b), 3214(a), and 3214(f), which impose certain reporting requirements on facilities providing abortion services. Before any of the provisions took effect, the petitioners, five abortion clinics and a physician representing himself and a class of doctors who provide abortion services, brought this suit seeking a declaratory judgment that each of the provisions was unconstitutional on its face, as well as injunctive relief. The District Court held all the provisions unconstitutional and permanently enjoined their enforcement. The Court of Appeals affirmed in part and reversed in part, striking down the husband notification provision but upholding the others.

Held: The judgment in No. 91-902 is affirmed; the judgment in No. 91-744 is affirmed in part and reversed in part, and the case is remanded.

947 F.2d 682 (CA3 1991): No. 91-902, affirmed; No. 91-744, affirmed in part, reversed in part, and remanded.

Justice O'CONNOR, Justice KENNEDY, and Justice SOUTER delivered the opinion of the Court with respect to Parts I, II, and III, concluding that: consideration of the fundamental constitutional question resolved by *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147, principles of institutional integrity, and the rule of *stare decisis* require that *Roe's* essential holding be retained⁸³⁴ and reaffirmed as to each of its three parts: (1) a recognition of a woman's right to choose to have an abortion before fetal viability and to obtain it without undue interference from the State, whose previability interests are not strong enough to support an abortion prohibition or the imposition of substantial obstacles to the woman's effective

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader.

See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

No. 98-066

MT SUPREME COURT
overturns US Supreme Ct

IN THE SUPREME COURT OF THE STATE OF MONTANA

1999 MT 261

296 Mont. 361

989 P.2d 364

JAMES H. ARMSTRONG, M.D.; SUSAN
CAHILL, P.A.; BARBARA POLSTEIN, D.O.;
MINDY OPPER, P.A.; and BLUE MOUNTAIN
CLINIC, on behalf of themselves and their patients
throughout Montana, the surrounding states and
Canada,

Plaintiffs and Respondents,

v.

THE STATE OF MONTANA and JOSEPH P.
MAZUREK, in his official capacity as Attorney
General for the State of Montana and his agents
and successors,

Defendants and Appellants.

APPEAL FROM: District Court of the First Judicial District,

In and for the County of Lewis and Clark,

985), 216 Mont. 65, 700 P.2d 153.

4. In his remarks to the Constitutional Convention, Delegate Campbell referred to this constitutional wall of separation as being "absolute". Notwithstanding, neither the United States Supreme Court nor this Court have interpreted constitutional church/state separation as being absolute. Both Courts have recognized that some governmental impacts on religious freedoms is constitutionally permitted. See *St. John's Lutheran Church v. State Comp. Ins. Fund* (1992), 252 Mont. 516, 523-24, 830 P.2d 1271, 1276-77 (citing *Cantwell v. State of Connecticut* (1940), 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213, and *United States v. Lee* (1982), 455 U.S. 252, 102 S.Ct. 1051, 71 L.Ed.2d 127).
5. A term added on the floor of the Convention. Montana Constitutional Convention, Verbatim Transcript, March 7, 1972, pp. 1680-81.
6. We have not, heretofore, specifically defined what makes a state interest "compelling," rather, leaving that determination to be made case by case. Nonetheless, we agree with the United States Supreme Court's test in the First Amendment free exercise cases, that to demonstrate that its interest justifying infringement of a fundamental constitutional right is "compelling" the state must show, at a minimum, some interest "of the highest order and . . . not otherwise served," see *Wisconsin v. Yoder* (1972), 406 U.S. 205, 215, 92 S.Ct. 1526, 1533, 32 L.Ed.2d 15, or "the gravest abuse[], endangering [a] paramount [government] interest[]," *Thomas v. Collins* (1945), 323 U.S. 516, 530, 65 S.Ct. 315, 323, 89 L.Ed. 430. See also *Miller v. Catholic Diocese of Great Falls* (1986), 224 Mont. 113, 116-17, 728 P.2d 794, 796 (citing *Yoder*). Some inkling of the Constitutional Convention's view of how serious a situation must exist before the government has a "compelling" interest for infringing the right of individual privacy can be gleaned from delegate comment on electronic surveillance. There, Delegate Dahood noted that, if it should ever be allowed at all, "electronic surveillance shall be justified only in matters involving national security, perhaps in matters involving certain heinous federal crimes where the situation is such that in those instances we must risk the right of individual privacy because there is a greater purpose to be served." Montana Constitutional Convention, Verbatim Transcript, March 7, 1972, p. 1687.
7. Delegate Campbell also referred to the 1890 law review article on privacy authored by Samuel Warren and Louis Brandeis (*The Right to Privacy*, 4 Harv. L. Rev. 193, 195, 205 (1890)), which asserted that the right of privacy encompasses "[t]houghts, emotions, and sensations" and the principle "of an inviolate personality"--concepts which deeply

those who, as a matter of their own good consciences, either favor or reject abortion. Most importantly, this cost does not permit the government's infringement of personal and procreative autonomy in the name of political ideology.

¶74. Rather, the price--the corresponding responsibility--for our commitment to the values and ideals of just government and for our enjoyment of our individual rights protected by Montana's Constitution is simply tolerance. And indeed, that is a token sum for, among other freedoms, the right to be let alone.

Summary

¶75. We hold that the core constitutional right infringed by the legislation at issue in the case at bar is the fundamental right of individual privacy guaranteed to every person under Article II, Section 10 of the Montana Constitution. We hold that the personal autonomy component of this right broadly guarantees each individual the right to make medical judgments affecting her or his bodily integrity and health in partnership with a chosen health care provider free from the interference of the government, except in very limited circumstances not at issue here. More narrowly, we hold that Article II, Section 10, protects a woman's right of procreative autonomy--here, the right to seek and to obtain a specific lawful medical procedure, a pre-viability abortion, from a health care provider of her choice. We also hold that the government has failed to demonstrate a compelling state interest for infringing upon these rights of privacy and that, therefore, the amendments to § 37-20-103, MCA, and § 50-20-109, MCA, enacted pursuant to Ch. 321, L. 1995, prohibiting a physician assistant-certified from performing a pre-viability abortion under the supervision of a licensed physician are unconstitutional under Article II, Section 10, of the Montana Constitution.

¶76. The judgment of the District Court is affirmed.

/S/ JAMES C. NELSON

We Concur:

/S/ J. A. TURNAGE

/S/ TERRY N. TRIEWELER

TITLE 40 – FAMILY LAW

40-1-203. Proof of age and medical certificate -- waiver of medical certificate requirement. (1) Before a person authorized by law to issue marriage licenses may issue a marriage license, each applicant for a license shall provide a birth certificate or other satisfactory evidence of age and, if the applicant is a minor, the approval required by 40-1-213. Each female applicant, unless exempted on medical grounds by rule of the department of public health and human services or as provided in subsection (2), shall file with the license issuer a medical certificate from a physician who is licensed to practice medicine and surgery in any state or United States territory or from any other person authorized by rule of the department to issue a medical certificate. The certificate must state that the applicant has been given a blood test for rubella immunity, that the report of the test results has been shown to the applicant tested, and that the other party to the proposed marriage contract has examined the report.

(2) In lieu of a medical certificate, applicants for a marriage license may file an informed consent form acknowledging receipt and understanding of written rubella immunity information and declining rubella immunity testing. Filing of an informed consent form will effect a waiver of the requirement for a blood test for rubella immunity. Informed consent must be recorded on a form provided by the department and must be signed by both applicants. The informed consent form must include:

- (a) the reasons for undergoing a blood test for rubella immunity;
- (b) the information that the results would provide about the woman's rubella antibody status;
- (c) the risks associated with remaining uninformed of the rubella antibody status, including the potential risks posed to a fetus, particularly in the first trimester of pregnancy; and
- (d) contact information indicating where applicants may obtain additional information regarding rubella and rubella immunity testing.

(3) A person who by law is able to obtain a marriage license in this state is also able to give consent to any examinations, tests, or waivers required or allowed by this section. In submitting the blood specimen to the laboratory, the physician or other person authorized to issue a medical certificate shall designate that it is a premarital test.

History: En. Sec. 1, Ch. 208, L. 1947; amd. Sec. 1, Ch. 21, L. 1959; amd. Sec. 1, Ch. 248, L. 1973; amd. Sec. 4, Ch. 33, L. 1977; R.C.M. 1947, 48-134; amd. Sec. 1, Ch. 33, L. 1979; amd. Sec. 1, Ch. 228, L. 1981; amd. Sec. 1, Ch. 154, L. 1983; amd. Sec. 1, Ch. 186, L. 1989; amd. Sec. 73, Ch. 418, L. 1995; amd. Sec. 113, Ch. 546, L. 1995; amd. Sec. 2, Ch. 294, L. 2007.

TITLE 41 - MINORS

41-1-103. Unborn children. A child conceived but not yet born is to be deemed an existing person, so far as may be necessary for its interests in the event of its subsequent birth.

History: En. Sec. 13, Civ. C. 1895; re-en. Sec. 3587, Rev. C. 1907; re-en. Sec. 5675, R.C.M. 1921; Cal. Civ. C. Sec. 29; Field Civ. C. Sec. 12; re-en. Sec. 5675, R.C.M. 1935; R.C.M. 1947, 64-103.

TITLE 44 – LAW ENFORCEMENT

44-3-404. Criminal penalty. A person is guilty of a misdemeanor and may be fined not more than \$500 or imprisoned in the county jail for not more than 1 year, or both, if he:

- (1) purposely fails to report or conceals a death, including a fetal death;
- (2) refuses to make available prior medical or other information in a death investigation;
- (3) without an order from the coroner or state medical examiner, purposely touches, removes, or disturbs a corpse, its clothing, or anything near the corpse; or
- (4) knowingly or purposely disobeys a cessation order of a coroner.

History: En. 82-445 by Sec. 19, Ch. 530, L. 1977; R.C.M. 1947, 82-445; amd. Sec. 23, Ch. 7, L. 1979; amd. Sec. 12, Ch. 660, L. 1991.

TITLE 46 – CRIMINAL PROCEDURE

46-4-122. Human deaths requiring inquiry by coroner. The coroner shall inquire into and determine the cause and manner of death and all circumstances surrounding a human death:

- (1) that was caused or is suspected to have been caused:
 - (a) in any degree by an injury, either recent or remote in origin; or
 - (b) by the deceased or any other person that was the result of an act or omission, including but not limited to:
 - (i) a criminal or suspected criminal act;
 - (ii) a medically suspicious death, unusual death, or death of unknown circumstances, including any fetal death; or
 - (iii) an accidental death; or
 - (c) by an agent, disease, or medical condition that poses a threat to public health;
- (2) whenever the death occurred:
 - (a) while the deceased was incarcerated in a prison or jail or confined to a correctional or detention facility owned and operated by the state or a political subdivision of the state;
 - (b) while the deceased was in the custody of, or was being taken into the custody of, a law enforcement agency or a peace officer;
 - (c) during or as a result of the deceased's employment;
 - (d) less than 24 hours after the deceased was admitted to a medical facility or if the deceased was dead upon arrival at a medical facility; or
 - (e) in a manner that was unattended or unwitnessed and the deceased was not attended by a physician at any time in the 30-day period prior to death;
- (3) if the dead human body is to be cremated or shipped into the state and lacks proper medical certification or burial or transmit permits; or
- (4) that occurred under suspicious circumstances.

History: En. Sec. 4, Ch. 660, L. 1991; amd. Sec. 2, Ch. 287, L. 1993.

46-4-123. Inquiry report. The coroner shall make a full report of the facts discovered in all human deaths requiring an inquiry under the provisions of 46-4-122. In the case of a fetal death inquiry under 46-4-122, the department of justice shall adopt rules for respectful transportation and delivery of the fetus to the place where the autopsy will be performed. The rules must require that a fetus be transported in a crush-proof container and be labeled with the words "fragile--human remains inside". The report must be made in triplicate on a form provided by the division of forensic sciences of the department of justice. The coroner and the medical examiner shall each retain one copy and shall deliver the other copy to the county attorney. If the coroner orders an autopsy during the course of an inquiry, the coroner shall also provide the medical examiner with a copy of the autopsy report. The forms must be completed and distributed as provided in this section as promptly as practicable.

History: En. Sec. 5, Ch. 660, L. 1991; amd. Sec. 1, Ch. 268, L. 2007.

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50-9-106. Consent by others to withholding or withdrawal of treatment. (1) If a written consent to the withholding or withdrawal of the treatment, witnessed by two individuals, is given to the attending physician or attending advanced practice registered nurse, the attending physician or attending advanced practice registered nurse may withhold or withdraw life-sustaining treatment from an individual who:

(a) has been determined by the attending physician or attending advanced practice registered nurse to be in a terminal condition and no longer able to make decisions regarding administration of life-sustaining treatment; and

(b) has no effective declaration.

(2) The authority to consent or to withhold consent under subsection (1) may be exercised by the following individuals, in order of priority:

(a) the spouse of the individual;

(b) an adult child of the individual or, if there is more than one adult child, a majority of the adult children who are reasonably available for consultation;

(c) the parents of the individual;

(d) an adult sibling of the individual or, if there is more than one adult sibling, a majority of the adult siblings who are reasonably available for consultation; or

(e) the nearest other adult relative of the individual by blood or adoption who is reasonably available for consultation.

(3) A full guardian may consent or withhold consent under subsection (1) as provided in [72-5-321](#).

(4) If a class entitled to decide whether to consent is not reasonably available for consultation and competent to decide or if it declines to decide, the next class is authorized to decide. However, an equal division in a class does not authorize the next class to decide.

(5) A decision to grant or withhold consent must be made in good faith. A consent is not valid if it conflicts with the expressed intention of the individual.

(6) A decision of the attending physician or attending advanced practice registered nurse acting in good faith that a consent is valid or invalid is conclusive.

(7) Life-sustaining treatment cannot be withheld or withdrawn pursuant to this section from an individual known to the attending physician or attending advanced practice registered nurse to be pregnant so long as it is probable that the fetus will develop to the point of live birth with continued application of life-sustaining treatment.

History: En. Sec. 12, Ch. 391, L. 1991; amd. Sec. 5, Ch. 240, L. 2003; amd. Sec. 1, Ch. 480, L. 2007.

Provided by Montana Legislative Services

TITLE 50, CHAPTER 15 – VITAL STATISTICS

50-15-403. Preparation and filing of death or fetal death certificate. (1) A person in charge of disposition of a dead body or fetus that weighs at least 350 grams at death or, if the weight is unknown, has reached 20 completed weeks of gestation at death shall obtain personal data on the deceased, including the deceased's social security number, if any, or, in the case of a fetal death, on the parents that is required by the department from persons best qualified to supply the data and enter it on the death or fetal death certificate.

(2) The person in charge of disposition of the dead body or fetus shall present the death certificate to the certifying physician, the certifying advanced practice registered nurse, or the coroner having jurisdiction for medical certification of the cause of death. The medical certification must be completed by the physician, the advanced practice registered nurse, or the coroner within the timeframe established by the department by rule. The person in charge of disposition shall obtain the completed certification of the cause of death from the physician, the advanced practice registered nurse, or the coroner and shall, within the time that the department may prescribe by rule, file the death or fetal death certificate with the local registrar in the registration area where the death occurred or, if the place of death is unknown, where the dead body was discovered.

(3) If a dead body is found in this state but the place of death is unknown, the place where the body is found must be shown as the place of death on the death certificate. If the date of death is unknown, then the approximate date must be entered on the certificate. If the date cannot be approximated, the date that the body was found must be entered as the date of death, and the certificate must indicate that fact.

(4) When a death occurs in a moving vehicle, as defined in 45-2-101, in the United States and the body is first removed from the vehicle in this state, the death must be registered in this state and the place where the body is first removed is considered the place of death. When a death occurs in a moving vehicle while in international air space or in a foreign country or its air space and the body is first removed from the vehicle in this state, the death must be registered in this state, but the actual place of death, insofar as it can be determined, must be entered on the death certificate.

History: En. Sec. 65, Ch. 197, L. 1967; amd. Sec. 107, Ch. 349, L. 1974; R.C.M. 1947, 69-4425; amd. Sec. 28, Ch. 7, L. 1979; amd. Sec. 3, Ch. 287, L. 1993; amd. Sec. 17, Ch. 515, L. 1995; amd. Sec. 2, Ch. 118, L. 1997; amd. Sec. 93, Ch. 552, L. 1997; amd. Sec. 2, Ch. 27, L. 1999; amd. Sec. 2, Ch. 258, L. 2001.

TITLE 50, CHAPTER 19 – PREGNANT WOMEN & NEWBORN INFANTS

50-19-301. Short title. This part may be cited as "**The Montana Initiative for the Abatement of Mortality in Infants (MIAMI) Act**".

History: En. Sec. 1, Ch. 649, L. 1989.

50-19-302. Purposes. The purposes of this part are to:

- (1) assure that mothers and children, in particular those with low income or with limited availability of health services, receive access to quality maternal and child health services;
- (2) reduce infant mortality and the number of low birthweight babies; and
- (3) prevent the incidence of children born with chronic illnesses, birth defects, or severe disabilities as a result of inadequate prenatal care.

History: En. Sec. 2, Ch. 649, L. 1989.

50-19-311. MIAMI project. (1) There is a MIAMI project established in the department.

(2) Under the project, the department shall provide the following services:

- (a) infant mortality review;
- (b) morbidity review of births involving low birthweight babies;
- (c) low birthweight prevention;
- (d) assistance to low-income women and infants in gaining access to prenatal care, delivery, and postpartum care;
- (e) referral of low-income women and children to other programs to protect the health of women and children, including:
 - (i) supplemental food programs for women, infants, and children;
 - (ii) family planning services; and
 - (iii) other maternal and child health programs;
- (f) public education and community outreach to inform the public on:
 - (i) the importance of receiving early prenatal care;
 - (ii) the need for good health habits during pregnancy; and
 - (iii) the availability of special services for pregnant women and for children.

History: En. Sec. 4, Ch. 649, L. 1989; amd. Sec. 2, Ch. 634, L. 1991.

50-19-401. Short title. This part may be cited as the "Fetal, Infant, and Child Mortality Prevention Act".

History: En. Sec. 1, Ch. 519, L. 1997.

50-19-402. Statement of policy -- access to information. (1) The prevention of fetal, infant, and child deaths is both the policy of the state of Montana and a community responsibility. Many community professionals have expertise that can be used to promote the health, safety, and welfare of fetuses, infants, and children. The use of these professionals in reviewing fetal, infant, and child deaths can lead to a greater understanding of the causes of death and the methods of preventing deaths. It is the intent of the legislature to encourage local communities to establish voluntary multidisciplinary fetal, infant, and child mortality review teams to study the incidence and causes of fetal, infant, and child deaths and make recommendations for community or statewide change, if appropriate, that may help prevent future deaths.

(2) A health care provider may disclose information about a patient without the patient's authorization or without the authorization of the representative of a patient who is deceased upon request of a local fetal, infant, and child mortality review team. The review team may request and may receive information from a county attorney as provided in 44-5-303(4), from a tribal attorney, and from a health care provider as permitted in Title 50, chapter 16, part 5, or applicable federal law. The review team shall maintain the confidentiality of the information received.

(3) The local fetal, infant, and child mortality review team may:

(a) perform an in depth analysis of fetal, infant, and child deaths, including a review of records available by law;

(b) compile statistics of fetal, infant, and child mortality and communicate the statistics to the department of public health and human services for inclusion in statistical reports;

(c) analyze the preventable causes of fetal, infant, and child deaths, including child abuse and neglect; and

(d) recommend measures to prevent future fetal, infant, and child deaths.

(4) A local fetal, infant, and child mortality review team may not review deaths of fetuses, infants, or children who are Indians and which deaths occur within the boundaries of an Indian reservation with a tribal government that opposes the review.

History: En. Sec. 2, Ch. 519, L. 1997; amd. Sec. 11, Ch. 396, L. 2003; amd. Sec. 1, Ch. 413, L. 2003.

50-20-101. Short title. This part may be cited as the "**Montana Abortion Control Act**".

History: En. by Sec. 1, Ch. 284, L. 1974; R.C.M. 1947, ; amd. Sec. 61, Ch. 130, L. 2005.

50-20-102. Statement of purpose -- findings. (1) The legislature reaffirms the tradition of the state of Montana to protect every human life, whether unborn or aged, healthy or sick. In keeping with this tradition and in the spirit of our constitution, we reaffirm the intent to extend the protection of the laws of Montana in favor of all human life. It is the policy of the state to preserve and protect the lives of all human beings and to provide protection for the viable human life. The protection afforded to a person by Montana's constitutional right of privacy is not absolute, but may be infringed upon by a compelling state interest. The legislature finds that a compelling state interest exists in the protection of viable life.

(2) The legislature finds, with respect to 50-20-401, that:

(a) the United States supreme court has determined that states have a legitimate interest in protecting both a woman's health and the potentiality of human life and that each interest grows and reaches a compelling point at various stages of a woman's approach to the full term of a pregnancy;

(b) the court has also determined that subsequent to viability, the state in promoting its interest in the potentiality of human life may, if it chooses, regulate and even proscribe abortion except when necessary, in appropriate medical judgment, for the preservation of the life or health of the woman;

(c) the holdings referred to in subsections (2)(a) and (2)(b) apply to unborn persons in order to extend to unborn persons the inalienable right to defend their lives and liberties;

(d) absent clear proof that an abortion is necessary to save the life of the woman, the abortion of a viable person is an infringement of that person's rights; and

(e) the state has a duty to protect innocent life and that duty has grown to a compelling point with respect to partial-birth abortion.

History: En. by Sec. 2, Ch. 284, L. 1974; R.C.M. 1947, ; amd. Sec. 1, Ch. 479, L. 1999.

50-20-103. Legislative intent. It is the intent of the legislature to restrict abortion to the extent permissible under decisions of appropriate courts or paramount legislation.

History: En. by Sec. 11, Ch. 284, L. 1974; R.C.M. 1947, .

TITLE 72 – ESTATES, TRUSTS AND FIDUCIARY RELATIONSHIPS

72-2-118. Afterborn heirs. An individual in gestation at a particular time is treated as living at that time if the individual lives 120 hours or more after birth.

History: En. 91A-2-108 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-2-108; amd. Sec. 18, Ch. 494, L. 1993; Sec. , MCA 1991; redes. by Code Commissioner, 1993.